No. 15869

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERS MILLING COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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Albers Milling Company, a Corporation,

Appellant,

vs.

United States of America,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

Appellant, Albers Milling Company, at all times pertinent herein was and is now a corporation duly organized and existing under the laws of the State of Oregon and qualified to do business in the State of California with its general offices and principal place of business located in the City of Los Angeles, County of Los Angeles, State of California. [R. 3, 18, 19.]

This appeal involves the federal excise tax upon the transportation of property. The taxes in dispute were paid by Appellant upon freight charges incurred for the transportation of its goods and merchandise from one point within the United States to another by common carriers. These taxes were collected by the carriers and paid to the Collectors of Internal Revenue in their respective collection districts. [R. 5, 19, 15.]

This proceeding involves claim for refund of transportation taxes, paid as aforesaid, in the amount of $28,027.84 for the period July 7, 1950 to October 31, 1950, plus interest thereon as allowed by law. [R. 7, 23.]

Proper claim for refund of said taxes, plus interest, was timely filed by Appellant with the District Director of Internal Revenue in Los Angeles, California. Said claim was disallowed in full. Thereafter suit thereon was duly filed in the District Court below. [R. 6, 23.] Jurisdiction was conferred upon that Court by Title 28, U. S. C., Section 1346(a)(1). [R. 24.] Final judgment was entered against Appellant by the District Court on November 7, 1957, and notice of appeal was timely filed on January 2, 1958. [R. 25.] Jurisdiction is conferred on this court by Title 28, U. S. C., Sections 1291, 1294.

Question Presented.

Can the federal tax upon the transportation of property be imposed for the period in question under Section 3475 (a) of the Internal Revenue Code of 1939, as amended, upon freight charges for merchandise transported within the United States where payment of the freight is made outside the United States by a bona fide employee of the taxpayer?

Statement of the Case.

During the period from July 7, 1950 to October 31, 1950, Appellant shipped quantities of its merchandise between various points in the United States over the lines of various railroads. These carriers billed Appellant for

the freight charges thus incurred plus the 3% federal transportation tax alleged to be payable thereon under Section 3475 of the Internal Revenue Code of 1939, as then in effect. [R. 19, 20.]

Appellant paid these freight bills, together with the transportation tax claimed by the carriers, with checks drawn upon various of its bank accounts. The checks, together with the associated freight bills, were mailed by Appellant to the Canadian office of one of its affiliated companies in Vancouver, British Columbia, Canada. Mr. D. L. Grout, a bona fide full-time employee of one of Appellant's feed stores in the State of Washington, traveled twice weekly to Vancouver, Canada, picked up the freight bills and the checks at the Canadian office and presented them in person to the agents of the respective carriers in Vancouver. The agents accepted the checks in payment and recorded the freight bills as paid. [R. 19, 20.]

The checks with which these bills were paid prior to August 7, 1950, were drawn upon various bank accounts maintained by appellant in banks in the United States. On August 7, 1950, appellant opened a bank account with the Canadian Bank of Commerce in Vancouver, Canada, and thereafter payment of the freight bills in Canada was made with checks drawn upon this account. [R. 21.] Before delivering these checks to the carriers Mr. Grout presented them to the Canadian Bank of Commerce, the bank upon which they were drawn, for acceptance. The bank thereupon accepted each of them and stamped each "Accepted". After these checks were thus accepted by

the Canadian bank Mr. Grout delivered them to the agents of the carriers in payment of the freight bills as previously indicated. [R. 20, 23.]

The amount of tax paid with checks drawn on the bank accounts in the United States was $6,258.21, and the amount of the tax paid with checks drawn on the Canadian account was $21,769.63, making total taxes of $28,027.84. [R. 22.]

Thereafter Appellant duly filed claim for refund of these taxes with the Director of Internal Revenue. [R. 23.] Recovery thereon was denied by the Director of Internal Revenue and by the District Court below following suit thereon. [R. 23, 25.] This appeal followed. [R. 25.]

Specification of Errors.

1. The District Court erred in holding that the transportation tax was payable upon charges for transportation of property where these charges were not paid within the United States. The court erroneously disregarded its own findings of fact regarding payment of the freight bills in Canada. [R. 24.]

2. The District Court erred in its interpretation of the taxing statute, in that the statute did not make imposition of the tax depend only upon shipment of the property being wholly within the United States. Payment of the freight charges within the United States was another statutory requirement for imposition of the tax. [R. 24.]

ARGUMENT.

I.

Under the Plain Meaning of the Taxing Statute the Transportation in Question Is Not Taxable and This Meaning Should Be Given Effect.

Section 3475(a) of the Internal Revenue Code of 1939 as amended (26 U. S. C., Sec. 3475), as in effect prior to November 1, 1950 and during the period July 7, 1950 to October 31, 1950, here in question, by its express terms levied the tax only upon amounts "paid within the United States". Briefly stated, this is an excise tax upon amounts paid under the following conditions: (1) paid within the United States, and (2) paid for the transportation of property by common carrier from one point in the United States to another.

The pertinent portions of said Section 3475(a) are as follows:

> "(a) Tax.—There shall be imposed upon the amount *paid within the United States* after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, . . ." (Emphasis supplied.)

Since these amounts were not paid within the United States, but were paid by Mr. Grout in Canada, the tax cannot apply. Congress could have made the tax payable even where the transportation charges were paid outside the United States but it did not choose to do so.

Later Congress decided that the tax should also apply where the payment was made outside the United States and promptly amended the law to so provide. Section 607(b), (c) of the Revenue Act of 1950, approved September 23, 1950, amended Section 3475(a) of the Internal Revenue Code of 1939 as follows:

> "(b) *Transportation of Property*—The first sentence of Section 3475(a) (relating to tax on transportation of property) is hereby amended to read as follows:
>
> "There shall be imposed upon the amount *paid within or without the United States* for the transportation of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, . . ." (Emphasis supplied.)
>
> "(c) *Effective date.*—The amendments made by this section shall apply to amounts paid on or after the first day of the first month which begins more than ten days after the date of the enactment of this Act for transportation which begins on or after such first day."

The amendment specifically provides that it shall apply only to payments made after the effective date thereof, which was November 1, 1950. The Commissioner of Internal Revenue also recognized that the amendment applied prospectively only by amending Regulations 113, Section 143.11, pertaining to this tax, to read as follows:

> "Sec. 143.11 Scope of Tax.—Section 3475(a) imposes a tax upon (a) amounts *paid within the United States* after December 1, 1942, for transportation, originating on or after such date, of property by rail,

> motor vehicle, water, or air from one point in the United States to another, and (b) *amounts paid without the United States, on or after November 1, 1950,* for transportation, originating on or after such date, of property by rail, motor vehicle, water, or air from one point in the United States to another. The tax applies only to amounts paid to a person engaged in the business of transporting property for hire." (Emphasis supplied.) (See T. D. 5826, 1951-1 Cum. Bul. 148.)

And again in Section 143.13 of the same Regulations the following paragraph was included:

> "With respect to amounts paid without the United States, the tax applies to amounts paid on or after November 1, 1950, for transportation originating on or after that date."

II.

The Transportation Charges Were "Paid" in Canada Within the Meaning of the Taxing Statute.

Appellant maintains that the amount of freight and the taxes in question were not paid within the United States. It paid such amounts outside the United States and within Canada. When Appellant's employee handed the checks to the carriers and they accepted them in Canada, the bills were paid.

To pay, in ordinary and common usage, includes to give a check in payment of a purchase or obligation. So common is the use of checks for payment of obligations today, that the whole business community would be surprised at any suggestion that the giving and receipt of a check did not constitute payment.

The universality of this usage is indicated by the definition of "pay" in Webster's New International Dictionary, 2d Edition Unabridged, as including:

> "To give a recompense; to make payment, requital or satisfaction; to discharge a debt; as he *pays* in full, *by check or on time.*" (Last emphasis supplied.)

The common meaning of payment as embracing the giving and receipt of a check is indicated in this language from *Miller v. Commissioner,* 164 F. 2d 268 (C. C. A. 3, 1947):

> "Furthermore, as a matter of common parlance, we think it is most common to speak of 'paying' an obligation by giving one's check for it. This is the common method of paying bills in this country."

The Court of Claims in *Kellogg Company v. United States,* 133 Ct. Cl. 507, 133 Fed. Supp. 387 (1955), cert. den., 350 U. S. 903, 100 L. Ed. 793, which is more fully discussed below, seems to have questioned whether delivery to the creditor in Canada of a cashier's check drawn upon a United States Bank constitutes payment in Canada rather than in the United States.

While Appellant firmly believes that the Court's decision was erroneous, in that delivery of a good check itself constitutes payment of the debt, Appellant's case is substantially distinguishable on the facts from the *Kellogg* case. $21,769.63 of the tax here in dispute, and the freight charges upon which the tax was levied, were paid with checks drawn upon Appellant's account with the Canadian Bank of Commerce in Vancouver, rather than with checks drawn upon a bank in the United States as in the case of the Kellogg Company.

The Court of Claims pointed out at 133 Fed. Supp. 389, that the cashier's checks with which the bills were paid were issued within the United States; drawn on a bank within the United States; and endorsed to the transportation companies within the United States. It observed that the checks were no doubt deposited and came back to the issuing bank for final payment. The Court then suggested that delivery of the checks to the carriers was merely a conditional payment until the checks were finally honored and paid by the issuing bank.

If "payment" of a debt, where made by check, is deemed to take place where the check is honored and paid by the bank upon which it is drawn, as indicated by the Court of Claims, payment in Appellant's case clearly took place in Canada with respect to checks drawn on the Canadian account. These checks were accepted by the drawee bank before they were given to the transportation companies and were later paid by the drawee bank in Canada. Payment took place without, not within, the United States.

Indeed, one of the three Judges in the majority in *Kellogg v. United States, supra,* based his decision entirely upon the proposition that the charges were "paid" within the United States. It would seem that under these circumstances even the Court of Claims would have held for Appellant herein through a change in the position of at least this one Judge, if this case had been before that Court.

Furthermore these checks were "accepted" by the Canadian bank before they were delivered to the carriers, thus earmarking from Appellant's account funds for payment of the check upon final presentation by the payee. Under such circumstances handing the "accepted" checks

to the railroads was virtually equivalent to a cash payment.

Under Canadian law acceptance of the check has the effect of giving it additional currency by showing on the face that it is drawn in good faith on funds sufficient to meet its payment and by adding to the credit of the drawer that of the drawee bank. See *Gaden v. The Newfoundland Savings Bank,* 12 A. C. 128, 134 (1899); Bills of Exchange Act, R. S., C. 16, Secs. 127, 128.

III.

The Scope of the Tax Statutes Should Not Be Extended by "Judicial Legislation".

Appellant further notes *Kellogg Company v. United States, supra,* in which a bare majority of three to two denied refund of transportation tax paid in Canada. Appellant maintains that its case is distinguishable on the facts from *Kellogg Company v. United States, supra,* because of the means of payment, as previously indicated, and further maintains that the *Kellogg* case is erroneously decided as a matter of law, is not binding upon this Court, and should be disregarded as a precedent.

Some of the Justices on the Court of Claims seem to have fallen into the error of disregarding the clear cut, objective test of taxability based upon place of payment, as prescribed by Congress in Section 3475(a), in favor of a subjective test based upon the taxpayer's motives for selecting one place of payment in preference to another.

While it is true that nebulous theories based upon questions of motive, intent, business purpose and the like have been introduced into the field of income taxation by administrative interpretation supported by some court

decisions, these theories should have no place in the precise field of excise taxation. An excise tax is a tax levied upon a particular thing or act. Precisely what Congress says is taxable should be taxed, and what it does not specifically tax should not be taxable. The purpose or motive of the taxpayer in placing his transaction within or without the reach of the tax then becomes irrelevant. It has thus been recognized in many excise tax cases that a taxpayer may so order his business as to pay the minimum tax which the law requires.

In *Samson Tire and Rubber Corporation v. Rogan,* 136 F. 2d 345, 347 (C. C. A. 9, 1943), the taxpayer had entered into a written contract with an affiliated company for the sale of tires and tubes as of June 1, 1932 in order to avoid the excise tax which became effective upon sales on and after June 21, 1932. The tires and tubes in question were not delivered to the buyer until after June 21, 1932. The Court of Appeals for the Ninth Circuit noted that one purpose of the agreement was to avoid the excise tax, but held for the taxpayer and quoted from *Gregory v. Helvering,* 293 U. S. 465, 469, 79 L. Ed. 596 as follows:

> "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted."

In *Standard Oil Company v. United States,* 130 Fed. Supp. 821, 823 (1955), the Court of Claims, the court which decided the *Kellogg* Case, *supra,* had before it the question whether the "sale" of gasoline from taxpayer to its wholly owned subsidiary on June 27, 28, 29 and 30,

1940, was sufficient to avoid increase in the federal manufacturer's sales tax on gasoline, which became effective July 1, 1940. Ordinarily the taxpayer held the gasoline itself until it was ready to sell it, but by selling it to the subsidiary before the effective date of the increase the higher rates were avoided. Since the subsidiary was not a manufacturer the subsequent sale by it after the tax went into effect would not be taxable. The Court held for the taxpayer and reasoned in part as follows:

> "We think that what occurred in the case before us was tax avoidance, and not tax evasion. The fact that there was no reason for the parties doing what they did, when they did it, except to escape taxes, does not make the transaction vulnerable. *United States v. Cumberland Public Service Co.,* 338 U. S. 451, 70 S. Ct. 280, 94 L. Ed. 251, affirming 83 F. Supp. 843, 113 Ct. Cl. 460."

This has been the rule at least as far back as 1873 in which the Supreme Court in *United States v. Isham,* 17 Wall. 496, 21 L. Ed. 728, 731, made the following analysis:

> "It is said that the transaction proved upon the trial in this case, is a device to avoid the payment of a stamp duty, and that its operation is that of a fraud upon the revenue. This may be true, and if not true in fact in this case, it may well be true in other instances. To this objection there are two answers:
>
> "1. That if the device is carried out by the means of legal forms, it is subject to no legal censure. To illustrate: The stamp act of 1862 imposed a duty of two cents upon a bank check, when drawn for an amount not less than $20. A careful individual, having the amount of $20 to pay, pays the

> same by handing to his creditor two checks for $10 each. He thus draws checks in payment of his debts to the amount of $20, and yet pays no stamp duty. This practice and this system he pursues habitually and persistently. While his operations deprive the government of the duties it might reasonably expect to receive, it is not perceived that the practice is open to the charge of fraud. He resorts to devices to avoid the payment of duties, but they are not illegal. He has the legal right to split up his evidences of payment and thus to avoid the tax. The device we are considering is of the same nature."

The difficulties created in extending by judicial interpretation the scope of a statute beyond its plain meaning are shown in the cases which decide whether a particular instrument is subject to tax upon issue as a debenture or similar security, or non-taxable as a promissory note. In *United States v. Leslie Salt Company,* 218 F. 2d 91, 92-93 (C. A. 9, 1954), affirmed 350 U. S. 383, 100 L. Ed. 441, the Court of Appeals held that an instrument issued by a bank and denominated a promissory note was non-taxable although it had many of the characteristics of instruments which some courts had deemed taxable. The court said:

> "We are not prepared to say that the decision [of the lower court] is wrong. There is no satisfactory evidence that Congress intended to tax instruments of this character—certainly none that it did so in anything approaching clear language. It is altogether likely that had Congress foreseen the development of corporate financing by means of large long-term placement loans like these it would not have repealed outright the statutory tax it had imposed during the first World War on promissory notes, but would have modified the statute to conform with

the development. Congress has since had abundant opportunity to legislate on the subject but has not seen fit to do so. We can not but feel that in the considerable number of instances where courts have upheld exactions of the tax in situations analogous to the present they have invaded a field belonging exclusively to Congress.

"In going one way or the other the judges have frequently relied on distinctions which appear to us to be without difference, mainly on whether the loan was negotiated with an insurance company or whether it was negotiated with a commercial bank. We may add that subsequent to the opinion below several decisions have come down, heading, as was inevitable, in all directions. The chief of these more recent efforts is the Second Circuit case of *Niles-Bement-Pond Co. v. Fitzpatrick,* 213 F. 2d 305. There the court, in holding for the taxpayer, wrestled with the unpleasant if not impossible task of distinguishing an earlier opinion of its own. Fortunately we are confronted with no problem of that nature."

Similar difficulties can result if the courts are required to decide under what circumstance handing a check to a creditor outside the United States is payment outside the United States and under what circumstances the very same act is payment "within" the United States.

And in *Crooks v. Harrelson,* 282 U. S. 55, 61, 75 L. Ed. 156, 176 (1930), in deciding a question of construction regarding the federal estate tax, a type of excise tax, the Court states:

"In support of the claim that a literal construction is not admissible, it is said that by other provisions of Sec. 402 certain interest in real property, such as dower, etc., are made subject to the tax without

regard to the conditions set forth in subdivision (a), and that this results in an incongruity amounting to an absurdity. But unless the Constitution be violated, Congress may select the subjects of taxation and qualify them differently as it sees fit; and if it does so in plain terms, as it has done here, it is not within the province of the court to modify the law by construction. In any event, conceding that the conditions assailed have produced the incongruous results complained of, they fall far short of that degree of absurdity contemplated by *Church of the Holy Trinity v. United States,* 143 U. S. 457, 36 L. Ed. 226, 12 S. Ct. 511, or by any other decision of this court.

"Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness. In *United States v. Merriam,* 263 U. S. 179, 187, 188, 68 L. Ed. 240, 244, 29 A.L.R. 1547, 44 S. Ct. 69, after saying that 'in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used,' we quoted with approval the words of *Lord Cairns in Partington v. Atty. Gen.,* L. R. 4 H. L. 100, 122, that 'if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however, apparently, within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

IV.

Conclusion.

Appellant should be taxed in accordance with the manner in which it actually transacted its business. The statute said that amounts paid within the United States for transportation were taxable. No rational basis existed for taxing amounts paid outside the United States until Congress decided to amend the law effective November 1, 1950. The government should not expect the courts to give retroactive effect to this amendment where Congress itself did not so do.

Wherefore, Appellant prays that the judgment below be reversed.

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